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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ROSARIO SALINAS, individually and) Case No.
on behalf of all others similarly situated,)

Plaintiff,

vs.

STEPHENS & MICHAELS
ASSOCIATES, INC.,

Defendants.

) **CLASS ACTION**

) **COMPLAINT FOR VIOLATIONS
OF:**

-) 1. KNOWING AND/OR
) WILLFUL VIOLATIONS OF
) TELEPHONE CONSUMER
) PROTECTION ACT [47 U.S.C.
) §227 ET SEQ.]
) 2. NEGLIGENT VIOLATIONS
) OF TELEPHONE CONSUMER
) PROTECTION ACT [47 U.S.C.
) §227 ET SEQ.]

DEMAND FOR JURY TRIAL

Plaintiff Rosaria Salinas (“Plaintiff”), individually and on behalf of all others
similarly situated, alleges the following against Defendant Stephens & Michaels
Associates, Inc. upon information and belief based upon personal knowledge:

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INTRODUCTION

1 1. Plaintiff's Class Action Complaint is brought pursuant to the
2 Telephone Consumer Protection Act, *47 U.S.C. 227 et seq.* ("TCPA").

3 2. Plaintiff, individually, and on behalf of all others similarly situated,
4 brings this Complaint for damages, injunctive relief, and any other available legal
5 or equitable remedies, resulting from the illegal actions of Defendant in
6 negligently, knowingly, and/or willfully contacting Plaintiff no Plaintiff's cellular
7 telephone, thereby the TCPA, *47 U.S.C. § 227*. Plaintiff alleges as follows upon
8 personal knowledge as to herself and her own acts and experiences, and, as to all
9 other matters, upon information and belief, including investigation conducted by
10 his attorneys.

11 **JURISDICTION AND VENUE**
12

13 4. Jurisdiction is proper under *28 U.S.C. § 1332(d)(2)* because Plaintiff,
14 a resident of California, seeks relief on behalf of a Class, which will result in at
15 least one class member belonging to a different state than that of Defendant, a
16 company with its State of Incorporation in New Hampshire. Plaintiff also seeks up
17 to \$1,500.00 in damages for each call in violation of the TCPA, which, when
18 aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00
19 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and
20 the damages threshold under the Class Action Fairness Act of 2005 ("CAFA") are
21 present, and this Court has jurisdiction.

22 5. Venue is proper in the United States District Court for the Northern
23 District of California pursuant to *18 U.S.C. 1391(b)* and *18 U.S.C. § 1441(a)*
24 because Defendant does business within the State of California, within the County
25 of Contra Costa and Plaintiff resides within this District.
26
27
28

PARTIES

6. Plaintiff, Rosario Salinas (“Plaintiff”), is a natural person residing in Contra Costa County in the state of California, and is a “person” as defined by 47 U.S.C. § 153(39).

7. Defendant, STEPHENS & MICHAELS ASSOCIATES, INC. (“Defendant”), is a company involved in consumer debt buying and recovery/collection and is a “person” as defined by 47 U.S.C. § 153 (39).

8. Defendants acted through their agents, employees, officers, members, directors, heirs, successors, assigns, principals, trustees, sureties, subrogees, representatives, and insurers.

FACTUAL ALLEGATIONS – TCPA

9. Beginning in or around July of 2015, Defendant contacted Plaintiff on her cellular telephone number ending in -4129, in an effort to collect an alleged debt owed from Plaintiff.

10. Defendant uses the services of TCN, Inc. (“TCN”) to place its collection calls and did so to make the calls in question to Plaintiff.

11. TCN provides Defendant with a cloud based calling service capable of both manual dialing, preview dialing, and predictive dialing.

12. Although the cloud based calling service that TCN provides to Defendant restricts Defendant’s use of the system to manual or preview dialing, the system itself can be used for predictive dialing merely by altering the user’s access to the system features. Defendant’s access to features of the cloud based calling system was restricted to manual or preview dialing, but the capacity of the cloud based system itself included predictive dialing. Defendant’s access to predictive dialing features on the same cloud based system Defendant uses for manual or preview dialing was readily alterable to include predictive dialing.

1 13. TCN uses the same cloud based calling system for manual dialing,
2 preview dialing, and predictive dialing, i.e., the system used for manual or preview
3 dialing is the same as that used for predictive dialing, thus demonstrating that
4 TCN's cloud based calling system has the *capacity* for predictive dialing. TCN's
5 cloud based dialing system is therefore an "automated telephone dialing system"
6 ("ATDS"). 47 U.S.C. § 227(a)(1).

7 14. Pursuant to the Federal Communications Commission's ("FCC") June
8 18, 2015 "Declaratory Order and Ruling" that "...the capacity of an autodialer is
9 not limited to its current configuration but also includes its potential
10 functionalities," the dialing system used by Defendant to call Plaintiff for
11 collections purposes was an ATDS. In this ruling, the FCC explicitly rejected the
12 "present use" or "current capacity" tests for whether the *system or equipment* used
13 for placing calls is an ATDS as it is defined in 47 U.S.C. § 227(a)(1). That is, the
14 capacity of the technology used for calling determines whether caller is using an
15 ATDS rather than factors such as the caller's access or personal capacity.

16 15. In its efforts to collect the alleged debt owed from Plaintiff, Defendant
17 used an "automatic telephone dialing system", as defined by 47 U.S.C. § 227(a)(1)
18 to place its daily calls to Plaintiff seeking to collect an alleged debt owed.
19

20 16. Defendant's calls constituted calls that were not for emergency
21 purposes as defined by 47 U.S.C. § 227(b)(1)(A).

22 17. Defendant's calls were placed to a telephone number assigned to a
23 cellular telephone service for which Plaintiff incurs a charge for incoming calls
24 pursuant to 47 U.S.C. § 227(b)(1).

25 18. During all relevant times, Defendant did not possess Plaintiff's "prior
26 express consent" to receive calls using an automatic telephone dialing system or an
27 artificial or prerecorded voice on her cellular telephone pursuant to 47 U.S.C. §
28 227(b)(1)(A).

CLASS ACTION ALLEGATIONS

15. Plaintiff brings this action individually and on behalf of all others similarly situated, as a member of the proposed class (hereafter “The Class”) defined as follows:

All persons within the United States who received any telephone calls from Defendant to said person’s cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had not previously consented to receiving such calls within the four years prior to the filing of this Complaint

16. Plaintiff represents, and is a member of, The Class, consisting of All persons within the United States who received any collection telephone calls from Defendant to said person’s cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had not previously not provided their cellular telephone number to Defendant within the four years prior to the filing of this Complaint.

17. Defendant, its employees and agents are excluded from The Class. Plaintiff does not know the number of members in The Class, but believes the Class members number in the thousands, if not more. Thus, this matter should be certified as a Class Action to assist in the expeditious litigation of the matter.

18. The Class is so numerous that the individual joinder of all of its members is impractical. While the exact number and identities of The Class members are unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff is informed and believes and thereon alleges that The Class includes thousands of members. Plaintiff alleges that The Class members may be ascertained by the records maintained by Defendant.

19. Plaintiff and members of The Class were harmed by the acts of

1 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
2 and Class members via their cellular telephones thereby causing Plaintiff and Class
3 members to incur certain charges or reduced telephone time for which Plaintiff and
4 Class members had previously paid by having to retrieve or administer messages
5 left by Defendant during those illegal calls, and invading the privacy of said
6 Plaintiff and Class members.

7 20. Common questions of fact and law exist as to all members of The
8 Class which predominate over any questions affecting only individual members of
9 The Class. These common legal and factual questions, which do not vary between
10 Class members, and which may be determined without reference to the individual
11 circumstances of any Class members, include, but are not limited to, the following:

- 12 a. Whether, within the four years prior to the filing of this
13 Complaint, Defendant made any collection call (other than a
14 call made for emergency purposes or made with the prior
15 express consent of the called party) to a Class member using
16 any automatic telephone dialing system or any artificial or
17 prerecorded voice to any telephone number assigned to a
18 cellular telephone service;
- 19 b. Whether Plaintiff and the Class members were damages
20 thereby, and the extent of damages for such violation; and
- 21 c. Whether Defendant should be enjoined from engaging in such
22 conduct in the future.

23 21. As a person that received numerous collection calls from Defendant
24 using an automatic telephone dialing system or an artificial or prerecorded voice,
25 without Plaintiff's prior express consent, Plaintiff is asserting claims that are
26 typical of The Class.

27 22. Plaintiff will fairly and adequately protect the interests of the members
28 of The Class. Plaintiff has retained attorneys experienced in the prosecution of

1 class actions.

2 23. A class action is superior to other available methods of fair and
3 efficient adjudication of this controversy, since individual litigation of the claims
4 of all Class members is impracticable. Even if every Class member could afford
5 individual litigation, the court system could not. It would be unduly burdensome
6 to the courts in which individual litigation of numerous issues would proceed.
7 Individualized litigation would also present the potential for varying, inconsistent,
8 or contradictory judgments and would magnify the delay and expense to all parties
9 and to the court system resulting from multiple trials of the same complex factual
10 issues. By contrast, the conduct of this action as a class action presents fewer
11 management difficulties, conserves the resources of the parties and of the court
12 system, and protects the rights of each Class member.

13 24. The prosecution of separate actions by individual Class members
14 would create a risk of adjudications with respect to them that would, as a practical
15 matter, be dispositive of the interests of the other Class members not parties to such
16 adjudications or that would substantially impair or impede the ability of such non-
17 party Class members to protect their interests.

18 25. Defendant has acted or refused to act in respects generally applicable
19 to The Class, thereby making appropriate final and injunctive relief with regard to
20 the members of The Class as a whole.

21 **FIRST CAUSE OF ACTION**

22 **Negligent Violations of the Telephone Consumer Protection Act**

23 **47 U.S.C. §227 et seq.**

24 26. Plaintiff repeats and incorporates by reference into this cause of
25 action the allegations set forth above at Paragraphs 1-25.

26 27. The foregoing acts and omissions of Defendant constitute numerous
27 and multiple negligent violations of the TCPA, including but not limited to each
28 and every one of the above cited provisions of 47 U.S.C. § 227 et seq.

28. As a result of Defendant's negligent violations of *47 U.S.C. § 227 et seq.*, Plaintiff and the Class Members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

29. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227 et seq.

30. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-29.

31. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227 et seq.*

32. As a result of Defendant's knowing and/or willful violations of *47 U.S.C. § 227 et seq.*, Plaintiff and the Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

33. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227 et seq.

- As a result of Defendant's negligent violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the Class members are entitled to and

request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B).

- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227 et seq.

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff and the Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
- Any and all other relief that the Court deems just and proper.

TRIAL BY JURY

34. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully submitted this 12th day of October, 2016.

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s/ Todd M. Friedman
Todd M. Friedman
Law Offices of Todd M. Friedman
Attorney for Plaintiff